Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

No. 92-717

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH EMILE SISSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTIONS PRESENTED

1. Whether the Confrontation Clause was violated when officers whom petitioner called to testify at a pretrial suppression hearing asserted their Fifth Amendment privilege against compelled self-incrimination.

2. Whether a federal magistrate properly issued a search warrant conditioned on an informant's making a controlled delivery of marijuana to a suspect's house, where the suspect had agreed during tape-recorded conversations to accept the marijuana.

3. Whether evidence validly seized from petitioner during a warrant-authorized search must be suppressed because the officers exceeded the scope of the warrant by seizing items belonging to third parties.

4. Whether petitioner's statements to the police were properly admitted at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 (1976)	12
California v. *Green*, 399 U.S. 149 (1970)	8
Coy v. *Iowa*, 487 U.S. 1012 (1988)	8
Dutton v. *Evans*, 400 U.S. 74 (1970)	8
Illinois v. *Gates*, 462 U.S. 213 (1983)	3
Maryland v. *Craig*, 110 S. Ct. 3157 (1990)	8
McCray v. *Illinois*, 386 U.S. 300 (1967)	8
Minnesota v. *Olson*, 495 U.S. 91 (1990)	6, 13
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987)	8
Rivera v. *United States*, 928 F.2d 592 (2d Cir. 1991)	10
United States v. *Borromeo*, 954 F.2d 245 (4th Cir.), cert. denied, 112 S. Ct. 3012 (1992)	12
United States v. *Decker*, 956 F.2d 773 (8th Cir. 1992)	12
United States v. *Hale*, 784 F.2d 1465 (9th Cir.), cert. denied, 479 U.S. 829 (1986)	11
United States v. *Heldt*, 668 F.2d 1238 (1982), cert. denied, 456 U.S. 926 (D.C. Cir. 1982)	11
United States v. *Hendricks*, 743 F.2d 653 (9th Cir. 1984), cert. denied, 470 U.S. 1006 (1985)	11
United States v. *Kimble*, 719 F.2d 1253 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984)	9
United States v. *Lambert*, 887 F.2d 1568 (11th Cir. 1989)	12
United States v. *Matlock*, 415 U.S. 164 (1974)	8, 9
United States v. *Medlin*, 842 F.2d 1194 (10th Cir. 1988)	12, 13

Cases—Continued: Page

United States v. *Rettig*, 589 F.2d 418 (9th Cir. 1978)..... 11
United States v. *Wylie*, 919 F.2d 969 (5th Cir. 1990)..... 10
United States v. *Young*, 877 F.2d 1099 (1st Cir. 1989).... 12
Waller v. *Georgia*, 467 U.S. 39 (1984) 11, 12

Constitution and statute:

U.S. Const.:
Amend. IV 6, 11
Amend. V 5, 8
Amend. VI 5, 8, 9
Confrontation Clause 6, 8, 9
21 U.S.C. 846 2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-717

JOSEPH EMILE SISSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is unpublished, but the judgment is noted at 966 F.2d 1455 (Table). The opinions and orders of the district court (Pet. App. 35-55, 56-77) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. On August 19, 1992, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including November 7, 1992. The petition for a writ of certiorari was filed on October 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a conditional guilty plea in the United States District Court for the Western District of Michigan, petitioner was convicted of attempted possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 57 months' imprisonment, to be followed by three years' supervised release. Pet. App. 90. The court of appeals affirmed. *Id.* at 1-34.

1. On January 10 and 11, 1990, Robert Baldori and an informant discussed a marijuana transaction. Baldori told the informant that he would take delivery of the marijuana on January 15, 1990. Based on tape recordings of the conversations and other information concerning Baldori's prior marijuana dealings, a federal magistrate judge issued a warrant on January 12, 1990, for the search of Baldori's residence. The warrant authorized the seizure of marijuana, marijuana proceeds in the form of U.S. currency, and various records relating to marijuana transactions and proceeds. The warrant was expressly conditioned on a successful delivery of marijuana by the informant to Baldori's residence. Pet. App. 2-3, 12-13, 40-41.

On January 15, 1990, the informant delivered 88 pounds of marijuana to Baldori. While the informant was inside Baldori's residence, officers watching the house saw petitioner drive up and go inside. The informant left the house shortly after midnight. He confirmed having delivered the marijuana to Baldori, but said he had not spoken with petitioner. Pet. App. 3.

After the informant successfully made the controlled delivery, some two dozen federal and local officers executed the search warrant. When the officers entered the

house after first announcing their presence, they saw petitioner and Baldori throwing garbage bags of marijuana out a rear door. In the course of the search, the officers found a travel bag containing $130,000 in cash and a briefcase containing some additional cash. The officers continued to search the residence for more than five hours. While the search was being conducted, the officers advised petitioner of his *Miranda* rights. After signing a written acknowledgement of those rights, petitioner agreed to talk with the officers. Petitioner admitted he had intended to use the cash in his travel bag to buy marijuana from Baldori. Pet. App. 3-4; Gov't C.A. Br. 6.

2. Following three days of hearings, the district court denied petitioner's motion to suppress the cash and his incriminating statements. Pet. App. 35-46. The court found that the magistrate issuing the warrant had "a substantial basis for concluding that there was probable cause to find marijuana at the Baldori residence once it was delivered by the informant." *Id.* at 42 (citing *Illinois* v. *Gates*, 462 U.S. 213, 238-239 (1983)). The court rejected petitioner's claim that the warrant's description of the items to be seized was overbroad. *Id.* at 42-43. The court specifically held that the officers properly had opened petitioner's overnight bag and briefcase as part of the warrant-authorized search. *Id.* at 44-46.

The court also denied petitioner's motion to suppress the incriminating statements he made to officers during the search. Pet. App. 46-54. The court found that petitioner had waived his *Miranda* rights and made the statements voluntarily. *Ibid.* The court observed that petitioner was a college graduate with prior experience in the criminal justice system who, during a lengthy conversation with the officers, "freely and openly dis-

cussed the Latin American policy of the Bush Administration, the war on drugs, recent magazine articles, [petitioner's] mother, and [his] employment with the National Institute[s] of Health." *Id.* at 53. The court specifically found, contrary to petitioner's testimony, that petitioner had not requested an attorney until the end of the interview. *Id.* at 47-49. Instead, the court found that "no question concerning the need for counsel was asked by [petitioner] until the end of the interrogation." *Id.* at 48. "At that point," the court found, "the questioning was stopped as is required by *Miranda* and its progeny." *Ibid.*

3. After entering a conditional guilty plea, but before sentencing, petitioner moved to reopen the suppression hearing. Petitioner's motion was based on newly discovered evidence indicating that the local officers had exceeded the scope of the warrant by, among other things, seizing slides and photographs of Baldori's girlfriend that were later shown around the office. As a result of those actions, several local officers were placed under investigation and two officers were charged with criminal offenses in state court. The district court reopened the suppression proceeding by granting "a hearing on the issue of whether the conduct of the officers who executed the search warrant exhibited a 'flagrant disregard' for its limitations." At the reopened hearing, petitioner called several officers who declined to testify by invoking the Fifth Amendment privilege against compulsory self-incrimination. Pet. App. 5-6, 58-59.

Following the reopened suppression hearing, the district court again denied petitioner's motion to suppress. Pet. App. 56-77. The court held that, while suppression of even legitimately seized evidence might be appropriate where the searching officers flagrantly disregard the

limitations of a warrant by conducting a general search, the record in this case did not support such a finding. *Id.* at 64-65. The court held that many of the challenged items (*i.e.*, numerous documents and computer disks belonging to Baldori) had properly been seized pursuant to the warrant. *Id.* at 65-69. The court found that "several items whose seizure cannot be justified on the grounds of practicality were taken by law enforcement officers." *Id.* at 69. Among the improperly seized items, according to the court, were slides and photographs of Baldori's girlfriend, Canadian currency belonging to Baldori's girlfriend, and a computer printer and facsimile machine belonging to Baldori. *Id.* at 69-70. The court declined to find that the officers flagrantly disregarded the warrant, however, and it held that a "search does not become invalid simply because some items not mentioned by the warrant are seized." *Id.* at 70-71. The court explained that "[t]his is especially true where, as in the present case, the items outside the scope of the warrant are not going to be used as evidence against the defendant." *Id.* at 71. The court also rejected petitioner's claim that his Sixth Amendment right to confront witnesses was violated when the officers petitioner called as witnesses at the hearing invoked their Fifth Amendment rights and declined to testify. Pet. App. 72-74.

4. The court of appeals affirmed. Pet. App. 1-34. The court first held that petitioner's Sixth Amendment right to confront witnesses was not violated when several officers invoked their Fifth Amendment rights and declined to testify at the suppression hearing. *Id.* at 6-8. The court explained that the officers were not "witnesses against" petitioner within the meaning of the Sixth Amendment, because it was petitioner who called them and they offered no testimony at all. *Id.* at 7. In any

event, the court noted, this Court consistently has referred to the Confrontation Clause as a "trial right," *id.* at 8, and "has rejected Confrontation Clause challenges to the use of incompetent testimony during suppression hearing[s]," *id.* at 7-8.

The court of appeals then rejected petitioner's challenges to the issuance and scope of the warrant. The court held that petitioner had standing as an overnight guest in Baldori's house to challenge the search. Pet. App. 9-11 (citing *Minnesota* v. *Olson*, 495 U.S. 91 (1990)). But the court upheld the magistrate judge's determination that there would be probable cause to search the house once Baldori accepted delivery of the marijuana on January 15, 1990. Pet. App. 11-16. The court explained that some courts have required that the contraband be on a "sure course" to the place to be searched when the warrant is issued, while other courts simply require that there be probable cause to believe that the contraband will be on the premises when the warrant is executed. *Id.* at 13-15. The court found that it "need not decide" between those formulations because "[t]he anticipatory warrant in this case is valid under either standard." *Id.* at 15. Based on the facts that the informant previously had arranged to deliver the marijuana to Baldori on January 15th and that the police controlled the marijuana in question, the court concluded that "there was sufficient assurance that marijuana would be delivered to Baldori's home to satisfy both the sure course and probable cause standards." *Id.* at 15-16.[1]

---

[1] The court also rejected several other Fourth Amendment claims. It held that the officers executed the warrant within a reasonable time after the controlled delivery (*id.* at 16-17); that the officers properly searched petitioner's briefcase and bag while executing the warrant (*id.* at 17-20); and that the search warrant was

The court also rejected petitioner's claim that suppression of everything seized during the search was required because the police flagrantly exceeded the scope of the warrant. Pet. App. 25-33. After reviewing various items seized during the search (*id.* at 26-30), the court agreed with petitioner that "some of the officers apparently engaged in egregious misconduct while searching the Baldori home," *id.* at 32. The court observed, however, that "the evidence incriminating [petitioner], the cash found in his overnight bag and briefcase, was within the scope of the warrant." *Id.* at 30. The court thus explained that "even if we were to find that the officers searched Baldori's home in flagrant disregard of the warrant's scope, we would find that the officers did not violate [petitioner's] rights." *Id.* at 32. The court concluded that "deterrence would not be served by allowing [petitioner] to benefit from the alleged violation of Baldori's and [Baldori's girlfriend's] Fourth Amendment rights." *Id.* at 32-33.

Finally, the court rejected petitioner's claim that his incriminating statements should have been suppressed. Pet. App. 33-34. The court noted that the arresting officer's testimony "indicates that [petitioner] engaged in a wide-ranging conversation for approximately two hours until he indicated that he wished to speak with an attorney" and that "[t]he interrogation then stopped." *Id.* at 33-34. The court found no evidence of coercion in the record but instead concluded that "the evidence indicates that [petitioner] voluntarily waived his

---

not facially overbroad in most respects but that, even if it should have limited the dates of records to be seized, the remedy simply would be to sever the invalid portion of the warrant from the remainder (*id.* at 20-25).

Miranda rights and agreed to talk with the officers." *Id.* at 34.

ARGUMENT

1. Petitioner contends (Pet. 21-31) that his Sixth Amendment right "to be confronted with the witnesses against him" was violated when several officers invoked their Fifth Amendment right against compelled self-incrimination at the suppression hearing. The court of appeals correctly rejected that contention.

This Court's decisions consistently refer to the right to confrontation as a right that applies "at trial." *Maryland* v. *Craig*, 110 S. Ct. 3157, 3164 (1990). See *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988) (Confrontation Clause grants right to face-to-face confrontation of "those who appear and give evidence at trial") (quoting *California* v. *Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 52, 54 n.10 (1987) (plurality opinion) ("[t]he opinions of this Court show that the right to confrontation is a *trial* right," and "the Court normally has refused to find a Sixth Amendment violation when the asserted interference with cross-examination did not occur at trial"); *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion) (right of confrontation "advance[s] a practical concern for the accuracy of the truth-determining process in criminal trials").

As these cases indicate, the Confrontation Clause does not apply to pretrial suppression hearings. In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court held that the Confrontation Clause did not prohibit a police officer from testifying at a suppression hearing about hearsay statements made by an informant. The Court relied on its prior holding in *McCray* v. *Illinois*, 386 U.S. 300 (1967), which "specifically rejected the claim that defen-

dant's right to confrontation under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment had in any way been violated." 415 U.S. at 175. The Court observed that, in *McCray*, "[t]he Government would have been obligated to produce the informer and to put him on the stand had it wanted to use his testimony at defendant's trial, but we sustained the use of his out-of-court statements at the suppression hearing." *Id.* at 174.

Even if the Confrontation Clause applied at pretrial suppression hearings, petitioner's confrontation rights would not have been violated because the officers he sought to examine were not "witnesses against him" within the meaning of the Sixth Amendment. Petitioner does not contend that any statements or testimony of those officers were offered against him, but instead claims that his own inability to call the officers prevented him from showing that they flagrantly exceeded the scope of the warrant.[2] Pet. 21, 29-30. Petitioner cites no authority for his extraordinarily broad reading of the Confrontation Clause, which is contrary to its plain language.

In any event, petitioner could not show prejudice even if his claim otherwise were valid. The court of appeals agreed with petitioner that "some of the officers apparently engaged in egregious misconduct while searching the Baldori home." Pet. App. 32. The court thus accepted as true the facts that petitioner sought to establish through the officers' testimony, but nevertheless held that petitioner was not entitled to suppression.

---

[2] Petitioner's reliance (Pet. 24-25) on *United States* v. *Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984), is thus doubly flawed. That case involved a government witness who (1) testified against the defendant (2) at trial.

Consequently, the alleged denial of confrontation was of no significance.

2. Petitioner next contends (Pet. 31-35) that the federal magistrate improperly issued a warrant conditioned on the informant's successful delivery of the marijuana to Baldori's residence. Petitioner does not contest the legality of anticipatory warrants in general. Every federal court of appeals that has considered the question has held that anticipatory warrants may be issued in appropriate cases. See *United States* v. *Wylie*, 919 F.2d 969, 974 (5th Cir. 1990) (upholding such a warrant and noting that "five other circuit courts of appeals have approved of anticipatory search warrants"). Indeed, where officers anticipate that a controlled delivery will occur in a residence, they should be encouraged to seek advance judicial approval rather than relying on exigent circumstances to justify a warrantless search.

There is no basis for further review of petitioner's fact-bound claim that probable cause was lacking here because the marijuana was not on a "sure course" for delivery to Baldori's residence. At the time the warrant was issued, Baldori had already agreed to accept the marijuana on January 15th, and the delivery was within the control of the officers and their cooperating informant.[3]

---

[3] Some courts have emphasized that greater assurances exist where probable cause is "based on a delivery controlled by the government" than when it is based on "a delivery expected in the ordinary course of the drug organization's operations." *Rivera* v. *United States*, 928 F.2d 592, 603 (2d Cir. 1991). Contrary to petitioner's suggestion (Pet. 34-35), the fact that the police had not yet obtained the marijuana to be used in the controlled delivery does not defeat probable cause. In the case principally relied on by petitioner (Pet. 34-35), the authorities had no control over whether the

3. Petitioner next contends (Pet. 35-44) that the cash seized from his bags should have been suppressed because the officers flagrantly disregarded the warrant's limitations when they seized other personal property belonging to Baldori and his girlfriend. That claim is precluded by *Waller* v. *Georgia*, 467 U.S. 39 (1984). In *Waller*, the Court summarily rejected a Fourth Amendment claim identical to the one raised by petitioner in this case. 467 U.S. at 43-44 n.3. Petitioners in *Waller* cited some of the same lower court decisions cited by petitioner for the proposition that when police seize items in flagrant disregard of the warrant's limitations "the entire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed." *Id.* at 44 n.3 (citing *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978)). In rejecting that claim, the Court explained:

> Petitioners do not assert that the officers exceeded the scope of the warrant in the places searched. Rather, they say only that the police unlawfully seized and took away items unconnected to the prosecution. The Georgia Supreme Court found that all items that were unlawfully seized were suppressed. In these circumstances, there is certainly no re-

---

drugs would end up in the home of the suspect. See *United States* v. *Hendricks*, 743 F.2d 653 (9th Cir. 1984), cert. denied, 470 U.S. 1006 (1985) (package containing drugs was being held at airport and there were no assurances suspect would claim it and bring it back to his residence). Compare *United States* v. *Hale*, 784 F.2d 1465, 1468-1469 (9th Cir.) (distinguishing *Hendricks* in holding that "a controlled delivery pursuant to a warrant issued earlier is, in this situation, permissible"), cert. denied, 479 U.S. 829 (1986).

> quirement that lawfully seized evidence be suppressed as well.

467 U.S. at 44 n.3 (citing *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976) and other cases).

In this case, the officers did not exceed the scope of the warrant with respect to the places they searched. The court of appeals held that the officers properly searched petitioner's briefcase and bag while executing the warrant. Pet. App. 17-20. Under *Waller*, there is thus no basis for suppressing the lawfully seized evidence even though the officers may have flagrantly disregarded the warrant's limitations when they seized other evidence.

Notwithstanding *Waller*, the Tenth Circuit has held that "[w]hen law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." *United States* v. *Medlin*, 842 F.2d 1194, 1199 (1988).[4] This case presents no occasion to resolve the tension between *Medlin* and *Waller*. Even assuming the validity of the rule of total suppression adopted by the Tenth Circuit in *Medlin*, the court of appeals correctly

---

[4] Apart from *Medlin*, federal courts of appeals consistently have declined to suppress evidence legitimately seized pursuant to a warrant simply because the police improperly seized other items not authorized by the warrant, although some courts continue to leave open the possibility of total suppression if the search was conducted in flagrant disregard of the warrant's limitations. See, *e.g.*, *United States* v. *Decker*, 956 F.2d 773, 778-779 (8th Cir. 1992); *United States* v. *Borromeo*, 954 F.2d 245, 246-247 (4th Cir.), cert. denied, 112 S. Ct. 3012 (1992); *United States* v. *Lambert*, 887 F.2d 1568, 1572-1573 (11th Cir. 1989); *United States* v. *Young*, 877 F.2d 1099, 1105-1106 (1st Cir. 1989).

held that petitioner is not entitled to relief. Unlike in *Medlin*, where the Tenth Circuit expressly held that "Medlin's Fourth Amendment rights were violated by the seizure and removal of the items" not covered by the warrant (842 F.2d at 1198), the items improperly seized in this case did not belong to petitioner. While petitioner's status as an overnight guest carried with it "a legitimate expectation of privacy in his host's home," *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990), it did not give him any property interest in items that belonged to Baldori and his girlfriend. Petitioner thus is seeking suppression not to remedy any unreasonable invasion of his own privacy interests but rather to remedy an allegedly unreasonable invasion of third parties' property interests. The rule of *Medlin*, whatever its validity, does not extend that far.

4. Finally, petitioner challenges (Pet. 44-48) the lower court factual findings that he voluntarily waived his *Miranda* rights and that the police ceased questioning him as soon as he indicated a desire to speak with an attorney. The district court's findings on these issues were based on credibility determinations following a lengthy evidentiary hearing. Petitioner has failed to show that the district court's factual findings were clearly erroneous. There is no basis for further review of that fact-bound issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

DECEMBER 1992